Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

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Proposition 64 applies to cases pending when it was adopted. Along with the California Courts of Appeal, in all but one case, the California Supreme Court has now ruled that Proposition 64 applies to all pending cases, including those filed before the November 3, 2004, effective date of the proposition.

Proposition 64 limited the right to sue for unfair competition (*Bus. & Prof. Code*, § 7200 ff.) to plaintiffs who, in fact, suffered injury from the tort and then, only if they could meet the requirements for a class action suit. In *Californians for Disability Rights v. Mervyn's* (Cal.Supr.Ct.; July 24, 2006) 39 Cal.4th 223, [138 P.3d 207, 46 Cal.Rptr.3d 57, 2006 DJDAR 9607], the court ruled that, although the usual presumption is that statutes operate prospectively only, application of the proposition to pending cases was required because the effect of the statute is prospective, i.e., it is "a statute that establishes rules for the conduct of pending litigation without changing the legal consequences of past conduct."

In the companion case of *Branick v. Downey Savings and Loan Association* (Cal.Supr.Ct.; July 24, 2006) 39 Cal.4th 235, [138 P.3d 214, 46 Cal.Rptr.3d 66, 2006 DJDAR 9612], the court held that, even though Proposition 64 applies to pending cases, the trial court has discretion to permit the filing of an amended complaint substituting a new plaintiff who qualifies under the proposition.

How not to conduct yourself in litigation. *Kreeger v. Wanland* (Cal. App. Third Dist.; July 25, 2006) 141 Cal.App.4th 826, [46 Cal.Rptr.3d 790, 2006 DJDAR 9690], demonstrates the disastrous consequences that ensue when lawyers lose sight of the objective of litigation and become personally embroiled. If nothing else, the costs to the lawyers should dissuade us from engaging in this type of misconduct.

Foreign tax returns are not subject to evidentiary privilege. *Civ. Code* §1799.1a prohibits disclosure of information obtained from federal or state income tax returns. This does not apply to a tax return filed in other countries. For this and other reasons, *Firestone v. Hoffman* (Cal. App. Second Dist., Div. 1; June 29, 2006) 140 Cal.App.4th 1408, [45 Cal.Rptr.3d 534, 2006 DJDAR 8611], held that the trial court improperly sustained plaintiff's objections to the production and introduction of his Canadian tax return.

The "can't eat your cake and have it" rule of judicial estoppel. Plaintiff asserted in a legal malpractice action that he had lost specified marital assets as a result of his lawyer's negligence. He settled the case and then sought to recover these assets, claiming they were community property, in an action for partition against his former wife, in whose name the assets were held. The doctrine of judicial estoppel precluded him from asserting these inconsistent positions and summary judgment against him was affirmed. *Levin v. Ligon* (Cal. App. First Dist., Div. 2; June 30, 2006) 140 Cal.App.4th 1456, [45 Cal.Rptr.3d 560, 2006 DJDAR 8639].

For another look at the doctrine of judicial estoppel in cases where the court refused to apply the doctrine, *see Gottlieb v. Kest* (Cal. App. Second Dist., Div. 1; July 10, 2006) 141 Cal.App.4th 110, [46 Cal.Rptr.3d 7, 2006 DJDAR 8995], and *Jogani v. Jogani* (Cal. App. Second Dist., Div. 1; July 10, 2006) 141 Cal.App.4th 158, [45 Cal.Rptr.3d 792, 2006 DJDAR 9033].

Sexual conduct is subject to discovery in HIV infection case. Where former wife sued husband alleging he infected her with the HIV virus, she was permitted to obtain discovery of his medical records and his prior sexual conduct. *John B. v. Sup.Ct. (Bridget B.)* (Cal.Supr.Ct.; July 3, 2006) 38 Cal.4th 1177, [137 P.3d 153, 45 Cal.Rptr.3d 316, 2006 DJDAR 8738]. Unfortunately, the majority opinion is silent with respect to the important issue whether plaintiff may discover the names and addresses of defendant's other sexual partners. In Justice Kennard's concurring and dissenting opinion, she indicates that this issue was not before the court. But her conclusion that the prior opinion of the Court of Appeal, which precluded these inquiries, still stands is questionable. Once the California Supreme Court grants review, the prior appellate court opinion is superseded.

Assignee of bad faith claim is entitled to attorney fees. In *Brandt v. Sup.Ct.* (1985) 37 Cal.3d 813, [693 P.2d 796, 210 Cal.Rptr. 211] our Supreme Court held that in a tort action against an insurer for breach of the covenant of good faith and fair dealing, the insured was entitled to recover, as damages, attorney fees attributable to efforts to recover policy benefits. In *Essex Insurance Co. v. Five Star Dye House, Inc.*, (Cal.Supr.Ct.; July 6, 2006) 38 Cal.4th 1252, [137 P.3d 192, 45 Cal.Rptr.3d 362, 2006 DJDAR 8819], the same court held that this right to attorney's fees was assignable and the assignee of the bad faith claim was thus, entitled to recover such fees.

SLAPPback statute applies to pending cases. In 2005, the legislature adopted *Code Civ. Proc.* §425.18, exempting SLAPPback suits from certain procedures otherwise applicable to

motions to strike under the anti-SLAPP statute. The anti-SLAPP statute (*Code Civ. Proc.* §425.16) provides expedited procedures to dismiss actions based on constitutionally protected conduct, including the filing of lawsuits. A SLAPPback suit is an action for malicious prosecution based on a prior action that was dismissed under the anti-SLAPP statute.

In *Soukup v. Law Offices of Herbert Hafif* (Cal.Supr.Ct.; July 27, 2006) 39 Cal.4th 260, [46 Cal.Rptr.3d 638, 2006 DJDAR 9839], our Supreme Court held that the SLAPPback statute applies to cases pending before the adoption of section 425.18.

Subdivision (h) of the SLAPPback statute precludes the use of the anti-SLAPP statute where the prior cause of action, from which the SLAPPback arises, was "illegal as a matter of law." Here the underlying action, which was dismissed under the anti-SLAPP statute, asserted causes of action for, among others, malicious prosecution, defamation and breach of fiduciary duties. Although the claims asserted in that action were found to be without merit, the court refused to characterize them as "illegal as a matter of law" under subdivision (h). The court concluded that illegality as a matter of law applies where defendant's assertedly protected constitutional activity has been "indisputably" determined to be illegal. As examples, the court cited cases involving charges of illegal campaign contributions and held that it is plaintiff's burden to establish such illegality.

In a companion case, *Flatley v. Mauro* (Cal.Supr.Ct.; July 27, 2006) 39 Cal.4th 299, [46 Cal.Rptr.3d 606, 2006 DJDAR 9854], a suit based on an attempt to extort money from a celebrity on threats of making rape allegations, the court held that since extortion was illegal, the communication was not constitutionally protected and hence not subject to the anti-SLAPP statute.

No attorney fees where SLAPP action dismissed before anti-SLAPP motion is filed. A defendant who prevails on an anti-SLAPP motion (Strategic Lawsuit Against Public Participation; *Code Civ. Proc.* §425.16) is entitled to attorney fees and costs. *Major v. Silna* (2005) 134 Cal.App.4th 1485, [36 Cal.Rptr.3d 875], held that even though plaintiff dismissed the action after defendant filed an anti-SLAPP motion, defendant was nevertheless entitled to recover attorney fees incurred in connection with the motion. But when the motion is filed after the SLAPP complaint has been dismissed, defendant is not entitled to fees. *S. B. Beach Properties v. Berti* (Cal.Supr.Ct.; July 31, 2006) 39 Cal.4th 374, [138 P.3d 713, 46 Cal.Rptr.3d 380, 2006 DJDAR 9913].

Also, where lawyers representing themselves succeeded in having a complaint stricken under the anti-SLAPP statute they were not entitled to recover attorney fees. *Witte v. Kaufman* (Cal. App. Third Dist.; August 1, 2006) 141 Cal.App.4th 1201, [46 Cal.Rptr.3d 845, 2006 DJDAR 10079]. The court noted, however, that attorneys representing themselves may retain counsel to assist them and be compensated for that expense.

No "adverse interest" where contingent fee contract provides for a charging lien. *California Rules of Professional Conduct* Rule 3-300 deals with a lawyer acquiring pecuniary interests adverse to the client. The rule imposes requirements such as to obtain the advice of an independent lawyer. The rule applies where a lawyer who obtains a charging lien in a contract for hourly fees must comply with the rule. *See Fletcher v. Davis* (2004) 33 Cal.4th 61, [14 Cal.Rptr.3d 58]. But the State Bar's Standing Committee on Legal Ethics, in a formal opinion, has declared that the rule does not apply to contingent fee contracts because such liens are inherent in such contracts. Decision No. 2006-170, (August 2006) [2006 DJDAR 10246].